STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

-vs-

BERNARD WILLIAM KADE,

Defendant-Appellant.

_____/

Supreme Court
No. 139540

Court of Appeals
No. 285402

Circuit Court
No. 07-215779-FH

139540
PLAE'S SUPPL

PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANT'S APPLICATION FOR LEAVE TO APPEAL

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JURISDICTIONAL STATEMENT

Defendant-Appellant filed an application in this Court for leave to appeal the per curiam opinion of the Court of Appeals affirming his convictions. MCR 7.301; MCR 7.302. In an Order dated January 22, 2010, this Court directed the Clerk to schedule oral argument on whether to grant the application or take other peremptory action. This Court also ordered the parties to file supplemental briefs within 42 days following the appointment of counsel.

COUNTER-STATEMENT OF QUESTION PRESENTED

I. BECAUSE THERE ARE NO CONSTITUTIONAL PROVISIONS, STATUTES OR COURT RULES REQUIRING TRIAL COURTS TO INFORM DEFENDANTS OF POTENTIAL HABITUAL OFFENDER SENTENCING CONSEQUENCES DURING PLEA PROCEEDINGS, HAS DEFENDANT FAILED TO DEMONSTRATE THAT THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING HIS MOTION TO WITHDRAW HIS GUILTY PLEA AFTER SENTENCING?

Defendant contends the answer is: "no."

The People contend the answer is: "yes."

The circuit court denied defendant's motion to withdraw his plea.

The Court of Appeals answered: "yes."

COUNTER-STATEMENT OF FACTS

Defendant was charged with third-degree fleeing and eluding, MCL 257.602a(3)(a), and driving while license suspended, second or subsequent offense (DWLS 2nd), MCL 257.904(3)(b). On July 31, 2007, he appeared before Oakland Circuit Court Judge Steven N. Andrews for his arraignment. (Guilty Plea Transcript, 7/31/07 [P], 3). Defendant acknowledged receipt of the general information, waived its formal reading, and stood mute for purposes of arraignment. (P, 3). Defense counsel then stated that he had talked to defendant about his rights and that defendant was prepared to plead guilty. (P, 3). Defense counsel stated there was no plea agreement and that defendant understood he was on probation at the time of the offenses, so there would be no *Cobbs*[1] plea. (P, 3-4). Counsel stated he had talked to defendant about his possible sentence if he pleaded guilty:

> I did explain to him what his guidelines are, but that a plea today will be a plea of guilty and at the time of sentencing, your Honor will determine based on all the information what the proper sentence will be. [P, 4]

Before taking defendant's plea, the trial court advised defendant that for the crime of third-degree fleeing and eluding, the maximum sentence was five years in prison and the minimum sentence was probation. (P, 5). The court advised defendant that for the crime of DWLS 2nd, the maximum sentence was one year in jail and the minimum sentence was probation. (P, 5). Defendant stated under oath that he understood his maximum and minimum sentences. (P, 4-5). Defendant denied that the plea was the result of a plea bargain between him, his attorney and the prosecutor. (P, 5). Defendant admitted that his plea was freely, understandingly and voluntarily made. (P, 7). Defendant denied that any promises were made to

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[1] *People v Cobbs,* 443 Mich 276; 505 NW2d 208 (1993)

him to induce his plea and denied there had been any undue influence, compulsion, duress or threats. (P, 7).

The trial court then took the factual basis for the plea. (P, 8-10). Defendant admitted that on February 23, 2007, he was driving a motor vehicle when a police officer activated his emergency lights and attempted to stop him. (P, 8). Defendant willfully failed to obey the officer's direction and attempted to flee. (P, 8-9). His driver's license was suspended or revoked at the time. (P, 9). Defendant admitted he had previously been convicted of DWLS on December 3, 2003 and January 29, 2004. (P, 9-10). The parties were satisfied that the court had complied with the court rule. (P, 10). The court made clear that there had been no plea or sentence agreements between the parties or the court. (P, 10).

On August 2, 2007, the Oakland County Prosecutor filed a notice of intent to seek sentence enhancement, third offense. MCL 769.11. (Appendix A). The notice listed the following two convictions for purposes of sentence enhancement: (1) a December 22, 2003 conviction of operating while intoxicated/impaired, third offense, out of Genesee County, and (2) an August 26, 1999 conviction of operating while intoxicated/impaired, third offense, out of Saginaw County. (Appendix A). The habitual offender notice contained information that defendant's maximum sentence after enhancement was ten years. (Appendix A).

During sentencing, the court and the parties reviewed a presentence investigation report (PSIR) from the Department of Corrections. The PSIR listed defendant's criminal history, including the convictions supporting the habitual offender sentencing enhancement. The PSIR contained information that defendant was an habitual third and his statutory maximum sentence as an habitual offender was ten years. [See PSIR].

Defendant was sentenced on August 14, 2007. (Sentencing Transcript, 8/14/07 [S]). At

sentencing, defense counsel stated that he had reviewed the PSIR. (S, 3). Counsel indicated that he was aware that defendant was charged as an habitual offender and that the recommendation was for a sentence of 30 months to 10 years in prison. (S, 3-4). The trial court sentenced defendant to 2½ to 10 years in prison for the third-degree fleeing and eluding conviction, 144 days in jail for the DWLS 2nd conviction and 144 days of credit. (S, 5-6).

On or about February 7, 2008, almost six months after he was sentenced, Defendant filed a motion to withdraw his plea. (Appendix B). He argued that his guilty plea was not knowing and intelligent because he was not informed until afterwards that he would be sentenced as an habitual offender. (Appendix B). Defendant argued that he pleaded guilty expecting that he would be sentenced according to the sentencing guidelines as represented to him by his attorney. (Appendix B).

On February 13, 2008, the trial court entered an opinion and order denying defendant's motion to withdraw his guilty plea. The court first pointed out that there was no absolute right to withdraw a plea, such a motion must be based on a showing of miscarriage of justice, and the decision whether to grant such a motion falls within the trial court's discretion. (Appendix C). The court then denied defendant's motion to withdraw his plea for the following reasons:

> The Court addressed the consequences of a guilty plea to Defendant. Indeed, the Court informed Defendant of the consequences of his plea. At the plea hearing, Defendant acknowledged that no one was forcing him to plead guilty, that no one made any promises to him and that he was pleading guilty freely, understandingly, and voluntarily. Defendant stated that he was pleading guilty because he was guilty, and provided the factual basis of his plea. The Court finds no merit in Defendant's current claim otherwise. [Appendix C].

Defendant filed a delayed application for leave to appeal in the Michigan Court of Appeals which was granted. (Appendix D). The Court of Appeals affirmed defendant's convictions and sentences. *People v Kade*, unpublished opinion per curiam of the Michigan

Court of Appeals, issued 7/7/09 (Docket No. 285402) (Appendix E). The Court of Appeals recognized that defendant's argument that his guilty plea was not knowing and intelligent had been rejected in *People v Boatman*, 273 Mich App 405; 730 NW2d 251 (2007). *Kade, supra*, slip op at 2. The Court explained that MCR 6.302(B)(2) had been interpreted to mean that a defendant must be advised of the maximum and minimum sentences applicable to the charged offense, but not the effect his habitual offender status has on sentencing. *Kade, supra*, slip op at 2. The Court held that because defendant's plea was not the result of a sentence agreement, he, unlike the defendant in *Boatman*, was not entitled to withdraw his plea. *Kade, supra*, slip op at 2.

Defendant, acting in propria persona, filed an application for leave to appeal with this Court. The People did not answer defendant's application. This Court, however, directed the Clerk to schedule oral argument on whether to grant the application or take other peremptory action. *People v Kade*, ___ Mich ___; 776 NW2d 912 (2010) (Appendix F). This Court directed the parties to address the following question at oral argument: "[W]hether the defendant is entitled to withdraw his plea because he was not advised of the maximum possible sentence as enhanced by his habitual offender status." *Id.* This Court also ordered the parties to file supplemental briefs. *Id.*

Additional facts, where pertinent to the issue raised on appeal, may be set forth in the argument section of this brief.

ARGUMENT

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING DEFENDANT'S MOTION TO WITHDRAW HIS GUILTY PLEA AFTER SENTENCING BECAUSE THERE ARE NO CONSTITUTIONAL PROVISIONS, STATUTES OR COURT RULES REQUIRING TRIAL COURTS TO INFORM DEFENDANTS OF POTENTIAL HABITUAL OFFENDER SENTENCING CONSEQUENCES DURING A PLEA PROCEEDING FOR THE SUBSTANTIVE OFFENSE.

STANDARD OF REVIEW & PRESERVATION OF ISSUE:

A plea may be withdrawn after sentencing only if there was an error in the plea proceeding that would entitle the defendant to have the plea set aside. MCR 6.310(C). Whether to grant or deny a motion to withdraw a guilty plea after sentencing is within the sound discretion of the trial court, and the decision will not be disturbed unless there is a clear abuse of discretion. *People v Ovalle,* 222 Mich App 463, 465; 564 NW2d 147 (1997). An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co,* 476 Mich 372, 388; 719 NW2d 809 (2006); *People v Babcock,* 469 Mich 247, 269; 666 NW2d 231 (2003). However, all legal questions should be reviewed de novo. *People v LeBlanc,* 465 Mich 575, 579; 640 NW2d 246 (2002).

Defendant preserved this issue by filing a motion to withdraw his guilty plea in the trial court after sentencing. MCR 6.310(D); *People v Lamorand,* 481 Mich 891; 749 NW2d (2008).

A. This Court should deny defendant's application for leave to appeal because his appeal will become moot in September 2010 when he is discharged from parole.

Defendant was paroled on September 22, 2009. His parole discharge date is September 22, 2010.[2] Defendant's appeal will become moot when he is discharged from parole on

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[2] See http://www.state.mi.us/mdoc/asp/otis2profile.asp?mdocNumber=295081.

September 22, 2010. *People v Filip,* 482 Mich 1118; 758 NW2d 279 (2008). *Cf. People v Gross,* 483 Mich 951; 763 NW2d 911 (2009)(Corrigan, J., dissenting)("I would not expend the scarce resources of the criminal justice system on this resentencing because defendant was paroled after he filed his application for leave to appeal in this Court. In my view, his current claim is moot precisely because he *is* at liberty while on parole).

The concerns raised by Justice Corrigan in *Gross, supra,* are even stronger in the case *sub judice* because defendant is within months of being discharged from parole. In fact, if this case is not scheduled for oral argument until September 2010 or later, defendant's appeal will be moot because most likely, he will have been discharged from parole. *Filip, supra.* Even if this case is scheduled for argument in May 2010, an opinion may not be issued until after defendant is discharge from parole.

The relief requested by defendant is to allow him to withdraw his plea. However, if his plea is vacated, "[T]he case may proceed to trial on any charges that had been brought or could have been brought against the defendant if the plea had not been entered." MCR 6.312. Since defendant is not asserting his innocence, vacating his plea will not provide him with any substantial benefit because he has almost completed serving his entire sentence, including his parole term. Consequently, a different case might be a better candidate for granting leave to appeal on the question the parties have been ordered to answer, "[W]hether the defendant is entitled to withdraw his plea because he was not advised of the maximum possible sentence as enhanced by his habitual offender status." (Appendix F).

B. The prosecuting attorney had statutory authority to file a notice of intent to seek an enhanced sentence after defendant's guilty plea.

Even if this Court believes that the case *sub judice* is the appropriate case in which to decide the question the parties have been ordered to answer, defendant's application for leave to appeal should be denied.

Defendant pleaded guilty to third-degree fleeing and eluding, MCL 257.602(3)(a), and DWLS 2nd, MCL 257.904(3)(b), ***at the circuit court arraignment***. Defendant was told during the plea proceeding that his maximum sentence for the fleeing and eluding charge was five years in prison. On the date of the arraignment and plea [July 31, 2007], the notice of intent to seek an enhanced sentence under the habitual offender act, MCL 769.13, had not yet been filed, but was timely filed two days later on August 2, 2007, before defendant's August 14, 2007 sentencing.

At sentencing, defense counsel noted that defendant's guidelines were 7 to 34 months' imprisonment and that defendant was being charged as an habitual offender. (S, 3-4).[3] The PSIR contained information that defendant was being sentenced as a third-felony offender. See PSIR. At sentencing, defense counsel did not ask to withdraw the guilty plea based on the filing of the notice of intent to seek an enhanced sentence. Judge Andrews sentenced defendant to 2½ to 10 years' imprisonment for the fleeing and eluding as a third-felony offender, five years longer than the maximum sentence Defendant was told for the offense during the plea proceeding. (P, 5; S, 5).

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[3] Defense counsel recognized that defendant was serving a 2½ to 5 year sentence in Genesee County and asked Judge Andrews to cut one year off of defendant's sentence recommendation in this case because defendant had already served a year in the Genesee County case. (S, 3).

In his motion to withdraw the guilty plea, filed almost six months after he was sentenced, defendant alleged that his attorney told him at the time of his plea that his guidelines were 7 to 23 months' imprisonment. (Appendix B, 2). Defendant further stated that he did not know that the People would seek to enhance his sentence. (Appendix B, 3). Judge Andrews denied defendant's motion, noting that defendant was advised of the consequences of his plea and agreed that no one had made him any promises. (Appendix C).

As indicated, on the date of his plea, defendant did not have written notice that the People would be filing a notice to seek an enhanced sentence; the trial court likewise did not have notice and did not advise defendant of the maximum possible sentence if enhanced. However, the People are statutorily authorized to file a notice of intent to seek an enhanced sentence ***after a defendant's arraignment***. MCL 769.13(1)[4] allows the prosecution to file a notice of intent to enhance a sentence under the habitual offender statutes if the same is filed within 21 days ***after the defendant's arraignment on the underlying offense*** or, if the arraignment is waived, within 21 days after the filing of the information charging the underlying offense. See also MCR 6.112(F).[5] Here, defendant's arraignment was the date of the plea (July 31, 2007), so the notice of intent filed on August 2, 2007 was timely filed.

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[4] The full text of MCL 769.13 is set forth in Appendix G.

[5] MCR 6.112(F) was added in 2000 to make the rule consistent with MCL 769.13. See Staff Comment to 2000 Amendment, MCR 6.112. MCR 6.112(F) provides:

> **(F) Notice of Intent to Seek Enhanced Sentence.** A notice of intent to seek an enhanced sentence pursuant to MCL 769.13 must list the prior convictions that may be relied upon for purposes of sentence enhancement. The notice must be filed within 21 days after the defendant's arraignment on the information charging the underlying offense or, if arraignment is waived, within 21 days after the filing of the information charging the underlying offense.

The prosecution was also statutorily authorized to file a notice of intent to enhance a sentence ***after defendant's guilty plea*** pursuant to MCL 769.13(3), which provides:

> The prosecuting attorney may file notice of intent to seek an enhanced sentence after the defendant has been convicted of the underlying offense or a lesser offense ***upon his or her plea of guilty or nolo contendere if the defendant pleads guilty or nolo contendere at the arraignment on the information charging the underlying offense***, or within the time allowed for filing of the notice under subsection (1). [Emphasis added].

The Michigan Legislature has given the prosecuting attorney authority to file a notice of intent to seek an enhanced sentence after a plea. Since statutes are presumed constitutional, defendant has the burden of proving the invalidity of MCL 769.13. See *People v Sadows,* 283 Mich App 65, 67; 768 NW2d 93 (2009). Defendant cannot meet this burden because, as set forth in detail below, there is no constitutional requirement that a defendant be informed of habitual offender sentencing consequences during the plea proceeding.

C. Since defendant was informed of the "direct consequences" of his guilty plea, he has no valid basis to withdraw his plea.

In *Boykin v Alabama,* 395 US 238, 242; 89 S Ct 1709; 23 L Ed 2d 274 (1969), the United States Supreme Court recognized the significance of a guilty plea – it is more than a confession; it is a conviction.[6] The United States Supreme Court indicated that a guilty plea must be knowingly and voluntarily entered because the plea involves the waiver of the privilege against compulsory self-incrimination,[7] the right to trial by jury[8] and the right to confront one's

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[6] See also *People v Erwin,* 212 Mich App 55, 61; 536 NW2d 818 (1995)(a conviction is a finding of guilt and occurs on the date of the plea).

[7] US Const, Am V, XIV; *Malloy v Hogan,* 378 US 1; 84 S Ct 1489; 12 L Ed 2d 653 (1964).

[8] US Const, Am VI, XIV; *Duncan v Louisiana,* 391 US 145; 88 S Ct 1444; 20 L Ed 2d 491 (1968).

accusers.[9] *Boykin,* 395 US at 243-244. The Court noted:

> A majority of criminal convictions are obtained after a guilty plea. If these convictions are to be insulated from attack, the trial court is ***best advised*** to conduct an on the record examination of the defendant which should include, *inter alia,* an attempt to satisfy itself that the defendant understands the nature of the charges, his right to a jury trial, the acts sufficient to constitute the offenses for which he is charged ***and the permissible range of sentences***. [395 US at 244, n 7, emphasis added].

Because a person who enters a guilty plea simultaneously waives several constitutional rights, in order for the waiver of these constitutional rights to be valid under the Due Process Clause,[10] the waiver must be "an intentional relinquishment or abandonment of a known right or privilege." *McCarthy v United States,* 394 US 459, 466; 89 S Ct 1166; 22 L Ed 2d 418 (1969), citing *Johnson v Zerbst*, 304 US 458, 464; 58 S Ct 1019; 82 L Ed 1461 (1938). A plea that is not voluntary and knowing has been obtained in violation of due process and is void. *McCarthy,* 394 US at 466. After *Boykin, supra,* the United States Supreme Court recognized that the standard for determining the validity of a plea "***[W]as and remains whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to defendant.***" *North Carolina v Alford,* 400 US 25, 31; 91 S Ct 160; 27 L Ed 2d 162 (1970), emphasis added.[11]

"It is because of the waiver of these rights and because a guilty plea is itself effectively a self-imposed conviction, that the process 'demands the utmost solicitude of which courts are

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[9] US Const, Am VI, XIV; *Pointer v Texas,* 380 US 400; 85 S Ct 1065; 13 L Ed 2d 923 (1965).

[10] The Due Process Clause provides that no state shall deprive any person of "life, liberty, or property, without due process of law." US Const, Am XIV; Const 1963, art 1, § 17. This Court has interpreted the state constitutional provision as coextensive with the federal provision. *People v Sierb,* 456 Mich 519, 523; 581 NW2d 219 (1998).

[11] See also *Boykin*, 395 US at 242; *Machibroda v United States*, 368 US 487, 493; 82 S Ct 510; 7 L Ed 2d 473 (1962); *Kercheval v United States*, 274 US 220, 223; 47 S Ct 582; 71 L Ed 1009 (1927).

capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequence.'" *People v Saffold*, 465 Mich 268, 286; 631 NW2d 320 (2001), citing *Boykin*, 395 US at 243-244. See also *Bradshaw v Stumpf*, 545 US 175, 183; 125 S Ct 2398; 162 L Ed 2d 143 (2005), citing *Brady v United States*, 397 US 742, 747-748; 90 S Ct 1463; 25 L Ed 2d 747 (1970)("A guilty plea operates as a waiver of important rights, and is valid only if done voluntarily, knowingly, and intelligently, 'with sufficient awareness of the relevant circumstances and likely consequences'"). The voluntariness of a plea is tested by considering the totality of the circumstances. *Brady*, 397 US at 749.

In order to ensure that pleas are voluntary, knowing and intelligent, this Court adopted procedures governing the acceptance of pleas in 1973,[12] and those procedures are currently set forth in MCR 6.302. *Saffold, supra* at 272. MCR 6.302, which trial courts are instructed to follow in order to obtain "understanding," "voluntary," and "accurate" pleas, provides in part:

> **(A) Plea Requirements.** The court may not accept a plea of guilty or nolo contendere unless it is convinced that the plea is understanding, voluntary and accurate. Before accepting a plea of guilty or nolo contendere, the court must place the defendant or defendants under oath and personally carry out subrules (B)-(E).
>
> **(B) An Understanding Plea.** Speaking directly to the defendant or defendants, the court must advise the defendant or defendants of the following and determine that each defendant understands:
> (1) the name of the offense to which the defendant is pleading; the court is not obliged to explain the elements of the offense, or possible defenses;
> (2) ***the maximum possible prison sentence for the offense and any mandatory minimum sentence required by law***;
> (3) if the plea is accepted, the defendant will not have a trial of any kind, and so gives up the rights the defendant would have at a trial, including the right:
> (a) to be tried by a jury;
> (b) to be presumed innocent until proved guilty;

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(c) to have the prosecutor prove beyond a reasonable doubt that the defendant is guilty;
(d) to have the witnesses against the defendant appear at the trial;
(e) to question the witnesses against the defendant;
(f) to have the court order any witnesses the defendant has for the defense to appear at the trial;
(g) to remain silent during trial;
(h) to not have that silence used against the defendant; and
(i) to testify at the trial if the defendant wants to testify[.]

(4) if the plea is accepted, the defendant will be giving up any claim that the plea was the result of promises or threats that were not disclosed to the court at the plea proceeding, or that it was not the defendant's own choice to enter the plea. [Emphasis added].

Substantial compliance with MCR 6.302 is sufficient. *Saffold, supra* at 273. Whether or not a deviation from the court rules requires reversal or remand for additional proceedings depends on the nature of the noncompliance. *Saffold, supra* at 273, citing *Guilty Plea Cases,* 395 Mich 96, 132; 235 NW2d 132 (1975). Pursuant to MCR 6.302(B)(2), a defendant must be told the maximum possible prison sentence ***"for the offense."*** This Court has previously found that the failure to inform a defendant of the "maximum sentence and the mandatory minimum sentence, if any, ***for the offense to which the plea was offered***" will continue to require reversal. *Guilty Plea Cases, supra* at 118, emphasis added.

Defendant was told the maximum possible prison sentence "***for the offense."*** In *People v Boatman*, 475 Mich 862; 714 NW2d 290 (2006), this Court remanded for consideration, as on leave granted, "[O]n whether defendant's plea was understanding when defendant was not informed of the maximum possible sentence as an habitual offender." Justice Young dissented[13] from the decision to remand because, "[D]efendant's plea was 'understanding' for purposes of MCR 6.302(B)." *Id.* Justice Young recognized that MCR 6.302(B) only required a defendant to

[13] Justice Corrigan joined the statement of Justice Young. *Id.* at 863.

be advised of the maximum possible sentence for the offense to which he pleads guilty and that the defendant's status as an habitual offender is not an offense. *Id.* Justice Young also noted that the defendant in *Boatman* had been made aware of the rights and incidents of trial that he was waiving by pleading guilty and the trial court had substantially complied with MCR 6.302(B). On remand, the Michigan Court of Appeals recognized that the trial court correctly informed the defendant of the maximum sentence for the charged offense because the habitual offender statute does not create a substantive offense separate and independent of the principal charge. *Boatman, supra* at 407-408.[14] The Court concluded that the trial court had complied with the mandate of MCR 6.302(B)(2) by informing the defendant of the maximum sentence for the underlying offense. *Id.*

The trial court in the case *sub judice*, not just substantially, but strictly complied with MCR 6.302(B)(2), because it informed defendant of the maximum penalty ***for the charged offense***. However, the question that still must be answered is whether strict compliance with MCR 6.302 is sufficient to ensure that a plea is understanding/knowing and voluntary when an habitual offender notice is filed after the plea.[15] See *Brady, supra* at 747-748(a plea not only must be voluntary, but must be knowing and intelligent to ensure sufficient awareness of the relevant circumstances and likely consequences); *McCarthy,* 394 US at 466.

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[14] Accord *Parke v Raley,* 506 US 20, 27; 113 S Ct 517; 121 L Ed 2d 391 (1992)(charge under a recidivism statute does not state a separate offense, but goes to punishment only); *Almendarez-Torres v United States,* 523 US 224, 239-247; 118 S Ct 1219; 140 L Ed 2d 350 (1998)(due process clause does not require that a defendant's recidivism be treated as an element of his offense).

[15] In *Hayes v State*, 146 Idaho 353, 355; 195 P3d 712 (Idaho App, 2008), the court held that if the requirements set forth in the guilty plea rule were followed, a prima facie showing that the plea was voluntary and knowing would be established.

In *Brady, supra*, the United States Supreme Court held that for a plea to be voluntary and intelligent, a defendant must be apprised of the ***direct consequences*** of entering the plea. 397 US at 755. See also *United States v Klem,* 544 F3d 266, 276-277 (CA 3, 2008). Whether defendant is entitled to withdraw his plea depends on whether the filing of the notice of intent to seek an enhanced sentence is a ***direct or collateral consequence***[16] of his plea-based conviction. See *People v Davidovich,* 238 App Mich 422, 427-428; 606 NW2d 387 (1999), aff'd 463 Mich 446 (2000).[17] The failure to advise a defendant of a collateral consequence does not render a plea involuntary. 238 Mich App at 429-430.

The United States Supreme Court has not defined which consequences of a guilty plea are direct and which are collateral. *Wilson v McGinnis,* 413 F3d 196, 199 (CA 2, 2005).[18] However, case law and commentators have suggested that a consequence of a guilty plea is "direct," and the defendant must be informed of it, where it has a "definite, immediate, and

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16 The terms direct and collateral are used to describe the nature of the consequences, not the nature of the attack. *Davidovich,* 238 Mich App at 427, n 4.

17 In *Davidovich,* this Court agreed with the Michigan Court of Appeals that immigration consequences of a plea are collateral matters that do not bear on whether a defendant's plea was knowing and voluntary. 463 Mich at 453. This Court also held that the failure by counsel to give immigration advice did not constitute ineffective assistance of counsel. *Cf. Padilla v Kentucky,* ___US___; ___S Ct___; ___L Ed 2d___ (issued 3/31/10)(counsels must inform their clients whether their pleas carry a risk of deportation in order to satisfy the Sixth Amendment).

18 In *Padilla, supra,* the United States Supreme Court indicated that "the collateral versus direct distinction" is "ill-suited" to evaluate an ineffective assistance of counsel claim concerning the risk of deportation. The *Padilla* case did not address the voluntariness of the petitioner's plea, the issue involved in the case *sub judice*. Moreover, the consequences of Padilla's plea differed from the consequences of defendant's plea because, as the Supreme Court recognized, Padilla's plea made his deportation presumptively mandatory, and any discretionary relief to prevent removal was not available for the charged offense. In comparison, an enhanced maximum sentence in this case was contingent on the prosecutor filing the notice of intent to seek an enhanced sentence, and on the trial court exercising its discretion and imposing the maximum sentenced authorized under MCL 769.11.

largely automatic effect on the range of punishment."[19] Alternatively, a consequence has been found to be collateral, and the trial court is not required to inform the defendant of it, where it lies within the discretion of the court whether to impose the consequence,[20] or where it is contingent upon actions controlled by a governmental agency that operates beyond the direct authority of the judge.[21]

The Court of Appeals in *Boatman, supra,* found that although a trial court is not required to advise a defendant of all potential sentencing consequences, because of the existence of specific sentencing guidelines[22] for habitual offenders, the effect of a defendant's habitual

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[19] *State v Recht,* 213 W Va 503; 583 SE2d 800 (2002), cert den 539 US 948 (2003), citing *Cuthrell v Director, Patuxent Institution,* 475 F 2d 1364, 1365-1366 (CA 4, 1973); *Major v State,* 814 So 2d 424, 428, 431 (Fla, 2002); *State v Ross,* 129 Wash 2d 279, 284; 916 P2d 405 (1996); *Wilson, supra* at 199; *United States v Kikuyama,* 109 F3d 536, 537 (CA 9, 1997); *United States v Salerno,* 66 F3d 544 (CA 2, 1995); 5 Wayne R. LaFave, Jerold H. Israel, Nancy J. King & Orin S. Kerr, Criminal Procedure (3d ed), § 21.4(d).

[20] *Kikuyama, supra*(whether the consecutive sentence was a direct consequence, as opposed to a collateral consequence, turned on whether the district court had discretion to impose a concurrent sentence).

[21] *Beagen v State,* 705 A2d 173, 175 (RI, 1998)(consequence is collateral if its imposition is controlled by an agency which operates beyond the direct authority of the trial judge – the federal criminal justice system is outside the authority of a state superior court justice); *United States v Littlejohn,* 224 F3d 960, 965 (CA 9, 2000)(where consequence is contingent upon action taken by an individual other than the sentencing court, the consequence is collateral); *People v Harnett,* 894 NYS 2d 614, 615 (2010)("collateral consequences are peculiar to the individual and generally result from the actions taken by agencies the court does not control"); *State v Denisyuk* ___A2d___ (Md App., dec'd 3/29/10), citing *Yoswick v State,* 347 Md 228, 241; 700 A2d 251 (1997)(parole eligibility is a collateral consequence rather than a direct consequence of a conviction, because parole decision "falls within the province of ... the executive branch" rather than being a decision "within the jurisdiction of the courts"); *LaFave, supra.*

[22] While it is true that the upper end of the statutory sentencing guidelines will increase based on the filing of a notice of intent to seek an enhanced sentence, *People v Gardner,* 482 Mich 41, 47-48; 753 NW2d 78 (2008), the fact the ***minimum sentence range*** will increase if an habitual offender notice is filed is irrelevant for purposes of determining whether the plea met the requirements of MCR 6.302. A trial court is not obligated to inform a defendant of the minimum sentence range set forth in sentencing guidelines because the guideline range does not set a mandatory minimum penalty for the offense. See LaFave, *supra*, n 104. See also *United*

....footnote continued on next page

offender status did not constitute a "collateral consequence," but was a "direct consequence." 273 Mich App at 408-409. However, the Court declined to expand the scope of MCR 6.302 even though the defendant's status as an habitual offender may "significantly affect the attainment of an understanding plea." *Id.* at 409-410.[23]

The People disagree with the finding in *Boatman, supra,* that the effect of a defendant's habitual offender status is a direct consequence of entering a plea on the underlying offense. Instead, it is a collateral consequence because the filing of an habitual offender notification is controlled by the prosecutor, a governmental agency that operates beyond the direct authority of the judge, and because the trial court retains the discretion whether to increase the maximum

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States v Quiroga, 554 F3d 1150, 1155 (CA 8, 2009)(inaccurate advice of counsel about the sentencing guidelines or likely punishment does not render involuntary a defendant's decision to plead guilty, so long as the defendant is informed of the maximum possible sentence permitted by statute and the court's ability to sentence within that range); *United States v Gomez-Cuevas,* 917 F2d 1521, 1527 (CA 10, 1990)(Rule 11 of the Federal Rules of Criminal Procedure is predicated on statutory minimum and maximum sentences readily ascertainable from the face of the applicable statute and the court's failure to advise a defendant that the sentencing guidelines apply is not the functional equivalent of a failure to inform him of a statutory minimum sentence); *United States v Henry*, 893 F2d 46 (CA 3, 1990)(sentencing "guideline range does not set a mandatory minimum penalty for an offense within meaning of Fed R Crim P 11(c)(1), as that rule is concerned with statutory minimum and maximum penalties and not with guidelines ranges"); *United States v Puckett,* 61 F3d 1092, 1099 (CA 4, 1995)(Fed R Crim P 11(c)(1) does not require a district court to advise the defendant about the applicable guideline range before accepting a guilty plea); *United States v Good,* 25 F3d 218, 222 (CA 4, 1994)(nothing in Fed R Crim P 11(c)(1) requires a court to advise a defendant about the applicable guideline range before accepting a plea).

[23] The decision in *Boatman* was not appealed again to this Court, which may be due to the fact the Court of Appeals vacated the defendant's plea. In *Boatman,* there was a plea agreement that the court would stay within the sentencing guidelines and defense counsel told the defendant the guidelines were six to twelve months – he was sentenced to a minimum sentence of three years. *Id.* at 406, 410-411. The Court of Appeals found that the defendant did not understand the consequences of his plea, especially when viewed with the fact that the trial court informed the defendant that he could withdraw his plea if the sentencing did not conform to the guidelines as represented by his counsel. *Id.* The trial court specifically told the defendant if the guidelines

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penalty for an habitual offender even if the habitual notice is filed. See *Kikuyama, supra*; *Beagen, supra.*

It is within the prosecutor's discretion whether to file a notice of intent to seek an enhanced sentence. MCL 769.13(1)("the prosecuting attorney ***may*** seek to enhance the sentence of the defendant as provided under section 10, 11, or 12..."). [24] If the notice is not timely filed, the sentencing court may not impose the enhanced sentence. See generally *People v Bollinger,* 224 Mich App 491, 492; 569 NW2d 646 (1997)(the supplemental habitual information should have been dismissed because it was not timely filed by the prosecutor).

Furthermore, even if the prosecutor files a notice of intent to seek an enhanced sentence, the trial court still has the discretion whether or not to increase the maximum penalty for the offense. *Gardner, supra* at 47; MCL 769.10(1); MCL 769.11(1); MCL 769.12(1); *People v Bewersdorf,* 438 Mich 55, 66; 475 NW2d 231 (1991); *People v Turski,* 436 Mich 878; 461 NW2d 366 (1990). A trial judge is not required to increase the *maximum penalty* simply because

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were not as represented by defense counsel, the court would determine whether he wanted to withdraw his plea. *Id.* at 411. That recitation did not occur in the case *sub judice.*

[24] See also *People v Morgan,* 85 Mich App 353; 271 NW2d 233 (1978)(filing an information under habitual criminal act by prosecutor is discretionary); *People v Gwinn,* 111 Mich App 223; 314 NW2d 562 (1981)(prosecutors' policy decision to file a supplemental information in all cases where prosecutors are aware of a previous Michigan felony conviction does not constitute an abuse of discretion); *Gardner, supra* at 79, n 13 (Cavanagh, J., dissenting)("giving notice of the intent to seek a sentence enhancement for a defendant who is an habitual offender is at the discretion of the prosecutor. See MCL 769.13(1)").

Although a defendant is no longer entitled to a jury trial and proof beyond a reasonable doubt on the issue whether he is an habitual offender [See *People v Zinn,* 217 Mich App 340; 551 NW2d 704 (1996], a defendant who has been given notice by the prosecutor of the intent to seek an enhanced sentence is entitled to challenge the accuracy or constitutional validity of the prior conviction by filing a written motion. MCL 769.13(4). If the defendant establishes a prima facie showing that the alleged prior conviction is unconstitutional, the prosecutor bears the burden of proving, by the preponderance of the evidence, that the prior conviction was constitutional. MCL 769.13(6).

the prosecutor filed a notice to seek an enhanced sentence. See *Kikuyama,* supra at 537. In fact this Court has indicated:

> If this Court was inclined to address defendant's deprivation of due process argument, we would be hard pressed to say that the habitual offender act increases the punishment for a crime. The enhancement in sentencing is discretionary, not mandatory, and the minimum term[25] is left undisturbed. Defendant's argument, which gained the support of the Court of Appeals, that the possibility of enhancement is the equivalent of an increase in punishment, is less than certain. [*People v Doyle,* 451 Mich 93, 102; 545 NW2d 627 (1996), n 12].

Out-of-state case law supports the People's contention that a defendant need not be told during the plea proceeding on the substantive offense about the maximum penalty that ***may*** be imposed ***if*** the prosecution subsequently files a notice to seek an enhanced sentence. In *Recht, supra*, the defendant pled guilty and was told the maximum prison term for both counts, but was not told that the state could initiate a recidivist proceeding. After the defendant's guilty plea, the state filed an information alleging that the defendant was a recidivist. The defendant tried to have the recidivist information quashed because he was not told during the plea proceeding that he could be sentenced to life if he was sentenced as a recidivist. The Virginia Supreme Court noted that the state court rule only required that, before accepting a guilty plea, the court advise the defendant of the "maximum possible penalty provided by law."[26]

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[25] Now the minimum sentencing guidelines will be higher if a notice of intent to seek an enhanced sentence is filed, but that fact has no relevance to whether the trial court erred in failing to inform defendant of the mandatory minimum sentence or the maximum sentence. See footnote 22, *supra*.

[26] The state court rule, West Virginia Rule of Criminal Procedure 11(c)(1) [WV R Crim P], was patterned after Rule 11 of the Federal Rules of Criminal Procedure [Fed R Crim P 11]. *Id.* at 510-511. The Virginia court indicated that in applying its Rule 11, it looked to the advisory committee's notes to Federal Rule 11. *Id.* at 511. The court noted the following:

> The advisory committee note to the 1974 amendment to the Federal Rule of Criminal Procedure 11 provides, in pertinent part:

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In *Recht, supra* at 511, the court distinguished between direct and collateral consequences of a plea, recognizing that whether a consequence must be disclosed "turns of whether the result represents a definite, immediate and largely automatic effect on the range of the defendant's punishment." In West Virginia, recidivist sentencing is not definite because the state retains the discretion to decide when to pursue it. *Id.* Moreover, there exists a separate recidivist proceeding requiring a written information, and the prosecution must prove the prior convictions and identity of the defendant beyond a reasonable doubt. *Id.* The court noted that neither the constitution nor the court rules required that a criminal defendant be advised of the possibility of habitual criminal proceedings prior to the entry of a plea of guilty. *Id.* at 512. The court indicated that to hold otherwise would result in unacceptable consequences because the defendant could plead guilty, well aware of his own criminal record, while the state is ignorant of

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> It has been suggested that it is desirable to inform a defendant of additional consequences which might follow from his plea of guilty.... The ABA Standards Relating to Pleas of Guilty § 1.4(c)(iii)(Approved Draft, 1968) recommend that the defendant be informed that he may be subject to additional punishment if the offense charged is one for which a different or additional punishment is authorized by reason of the defendant's previous conviction.
>
> Under the rule the judge is not required to inform a defendant about these matters, though a judge is free to do so if he feels a consequence of a plea of guilty in a particular case is likely to be of real significance to the defendant.

Thus, Rule 11 does not require a trial court to advise a defendant concerning a possible recidivist enhancement[FN5] and the trial court in this case committed no error in not so informing Mr. Appleby.

> FN5. While we acknowledge contrary authority, this authority does not discuss the advisory committee's note. [*Id*].

the predicate felony, and then seek to void the plea based on lack of notice of the habitual criminal proceedings. *Id.* n 7.[27]

In *State v Elliott,* 133 NH 190; 574 A2d 1378 (1990), the defendant sought to withdraw his guilty plea, claiming it was involuntary and unintelligent because he was not advised that his conviction would immediately make him liable to be declared a motor vehicle habitual offender. 133 NH at 191. The New Hampshire Supreme Court noted that the Due Process Clause of the Fourteenth Amendment obligated the trial court to ascertain on the record that a defendant appreciated the circumstances and consequences of his plea. 133 NH at 192, citing *Boykin,* 395 US at 242, 245. The *Elliott* court recognized that the consequences trial courts are obligated to communicate to a defendant are those that are "direct" as opposed to those that are merely collateral. *Elliott, supra.* The court indicated:

> The possible significance of a guilty verdict for purposes of the habitual offender act is a classic example of a conviction's consequences that is collateral, in the sense that the consequence requires application of a legal provision extraneous to the definition of the criminal offense and the provisions for sentencing those convicted under it. Thus we have consistently held that a sentencing court need not advise a defendant about the habitual offender law before accepting a guilty plea to a predicate offense under that law.
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> * * * *
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> ....We adhere, rather, to those cases in concluding that a defendant's knowledge of collateral consequences is not within the scope of the "intelligent and voluntary" state of mind that must affirmatively be demonstrated to the court before acceptance of a guilty plea. We consequently hold that defense counsel's failure to advise of collateral consequences, as under the habitual offender law, is

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[27] The court did recognize that from a practical standpoint, the better course of action would be for the trial court to advise a defendant about the possibility of recidivist proceedings being instituted, but the failure to do so did not violate the petitioner's constitutional right to due process of law. *Id.* at 512.

no ground for withdrawing a plea as unintelligent and involuntary. [*Elliott,* 133 NH at 192-193, citations omitted].[28]

Admittedly, there is contrary case law holding that the failure to inform a defendant of the possibility of an enhanced sentence is sufficient grounds to allow the withdrawal of a guilty plea. See *Marquez v Hatch,* 146 NM 556; 212 P3d 1110, 1114, 1115 (2009),[29] and cases cited therein. However, the cases so holding have not addressed the argument that the increase in the maximum sentence is not "definite" because the filing of an habitual offender notice is within the sole discretion of the prosecutor and a trial court is not obligated to increase the statutory maximum.

In Michigan, the filing of a habitual offender notice is within the discretion of the prosecutor and the trial court retains the discretion whether or not to impose an enhanced *maximum* sentence. Since the possibility of an enhanced maximum sentence is a collateral

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[28] Accord *State v Barton,* 93 Wash 2d 301, 305-306; 609 P2d 1353 (1980)(an habitual criminal proceeding is a collateral consequence of a guilty plea because the prosecution has the discretion whether or not to file. Moreover, a defendant's status as an habitual offender is determined in a subsequent trial. Neither the constitution nor the court rule requires that a criminal defendant be advised of the possibility of habitual criminal proceedings prior to the entry of a plea of guilty); *US v Bozza,* 132 F3d 659, 661 (CA 11, 1998)(although the defendant was not told of the intention to seek sentencing enhancement until after his plea, he was not entitled to withdraw his plea because he had notice of the possible enhancement from the release bond for his prior conviction, from the government's notice seeking sentencing enhancement and from the revised PSR); *US v Phimister,* 296 F Supp 1027, 1029 (1969)(apart from state's statutory requirement, there was no federal constitutional right that a defendant entering a voluntary plea be advised by the court of the permissible sentence that can be imposed. While such a course is desirable, the failure to do so does not by itself violate federal right to due process of law. The alleged lack of knowledge of a permissible increased penalty because petitioner was a recidivist is not sufficient to void the plea).

[29] In *Marquez, supra* at 1114, the New Mexico Supreme Court indicated that sentencing enhancements based on a defendant's prior convictions are generally regarded as a consequence of which the defendant must be advised before pleading guilty. The court further noted that when a defendant's plea will most certainly result in an immediate sentence enhancement

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consequence of a plea-based conviction on the substantive offense, the trial court did not abuse its discretion in denying defendant's motion to withdraw his plea because there was no error in the plea proceeding that would entitle him to have his plea set aside. MCR 6.310(C).

D. Even if defendant's habitual offender status has a "direct consequence" on sentencing for the substantive offense, no constitutional error resulted by the trial court's failure to inform defendant during the plea proceeding that his maximum sentence might be enhanced.

Neither the United States Supreme Court[30] nor this Court has ever held that the Due Process Clause[31] requires a trial court to inform a defendant during the plea proceeding on the

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because of a prior conviction, the court must advise the defendant of that likelihood before accepting the plea. *Id.* at 1115.

[30] The Supreme Court has noted the following:

> "It goes without saying that preventing and dealing with crime is much more the business of the States than it is of the Federal Government, and that we should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States. Among other things, it is normally 'within the power of the State to regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion,' and its decision in this regard is not subject to proscription under the Due Process Clause unless 'it offends some principles of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" [*McMillan v Pennsylvania,* 477 US 79, 85; 106 S Ct 2411; 91 L Ed 2d 67 (1986), citations omitted].

[31] "Textually, only procedural due process is guaranteed by the Fourteenth Amendment; however, under the aegis of substantive due process, individual interests likewise have been protected against." *Sierb, supra* at 522-523. However, courts are reluctant to expand the concept of substantive due process. *Id.* at 528. Although defendant has not articulated his particular due process claim, it is necessarily a procedural due process claim because he is claiming that prior to his pleading guilty, he should have been told that his maximum sentence could be enhanced based on his status as an habitual offender. See *Com v Hunt,* 73 Mass App Ct 616, 619; 900 NE2d 121 (Mass App, 2009)("given the solemnity of the event and its consequences, a variety of procedural protections govern the guilty plea process"). See also *People v Haynes,* 256 Mich App 341, 348-349; 664 NW2d 225 (2003)(when government action deprives a person of life, liberty or property, it must be implemented in a fair manner); *Thomas v Pogats,* 249 Mich App 718, 724; 644 NW2d 59 (2002)(due process calls for procedural protections as the situation demands including fundamental fairness); *Carey v Piphus,* 435 US 247, 259; 98 S Ct 1042; 55 L Ed 2d 252 (1978)("procedure due process rules are meant to

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substantive offense that his maximum sentence *may be increased* if he is subsequently determined to be an habitual offender. Such notice is unnecessary due to the unique procedural posture of habitual offender proceedings.

In Michigan, it has been made abundantly clear that the Legislature did not intend to make a separate substantive crime out of being an habitual criminal, instead, the Legislature, "***for deterrent purposes***, intended to augment the punishment for second or subsequent felonies." *Doyle, supra* at 102, citing *Bewersdorf, supra* at 67, emphasis added. The habitual offender act "provides a procedure ***after conviction*** for the determination of a fact which the court is required to consider in imposing sentencing." *Bewersdorf, supra* at 67-68, citing *People v Judge of Recorder's Court,* 251 Mich 626, 627; 232 NW 402 (1930), emphasis added. Michigan's existing procedure, allowing for the sentencing of a defendant as an habitual offender without a trial or proof beyond a reasonable doubt, does not violate due process. See *Zinn, supra*; MCL 769.13.[32]

In *Oyler v Boles,* 368 US 448, 451-452; 82 S Ct 501; 7 L Ed 2d 446 (1962), the United States Supreme Court rejected the petitioner's argument that procedural due process under the Fourteenth Amendment required notice of the habitual criminal accusation ***prior to the trial on the substantive offense***. Instead, notice was proper ***if received after conviction on the substantive offense***, but before sentencing. 368 US at 453. The court noted that any other rule

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protect persons not from [a] deprivation, but from the mistaken or unjustified deprivation of life, liberty or property").

[32] See also footnote 24, *supra.*

would place a difficult burden on the state because the fact of the prior conviction is within the knowledge of the defendant and may not come to light in a timely fashion. 368 US at 504, n 6.[33]

In *Almendarez-Torres,* 523 US at 244, citing to *Oyler, supra*, the Court noted that the Due Process Clause does not require advance notice that a trial for the substantive offense will be followed by accusation that the defendant is an habitual offender. The Court recognized that although a statutory minimum binds a sentencing judge, a statutory maximum does not. *Almendarez-Torres,* 523 US at 244. The Court rejected the constitutional argument that the petitioner's recidivism must be treated as an element of the offense. 523 US at 247. See also *McMillan,* 477 US at 84-86(even though sentencing enhancement may increase punishment, it is not subject to constitutional protections to which elements are subject).[34]

The highest courts of this State and of the United States have recognized that habitual offender proceedings are afforded less procedural protections than proceedings for the substantive offenses. Less procedural protections are allowed because the determination whether

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[33] See also *Littlejohn, supra* at 968(where recidivism is not discovered until after the plea, a trial court cannot provide any meaningful warnings related to the recidivist issues and has no duty to inform the defendant of the recidivism effects during the plea).

The concern raised in *Oyler, supra* is extremely significant in the context of guilty pleas occurring at circuit court arraignments in district court. See MCR 6.111. Since January 1, 2006, a defendant can plead guilty in district court in criminal cases cognizable in the circuit court immediately after the bindover of the defendant. MCR 6.111(A). However, an habitual offender notice will never be filed before a defendant is bound over to circuit court.

[34] In *Apprendi v New Jersey,* 530 US 466; 120 S Ct 2348; 147 L Ed 2d 435 (2000), the United States Supreme Court held under the due process clause:

> ***Other than the fact of a prior conviction,*** any fact that increases the penalty for crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt... "It is unconstitutional for a legislature to remove from the jury the assessment of fact that increase the prescribed range of penalties to which a criminal defendant is exposes. It is equally clear that such facts must be established by proof beyond a reasonable doubt." [*Apprendi,* 530

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a person is an habitual offender is independent of the determination of guilt on the substantive offense. *Oyler,* 368 US at 452. During a plea proceeding or trial on the substantive offense, a defendant's status as an habitual offender is irrelevant; the habitual offender status only becomes relevant upon ***conviction*** for the substantive offense. Defendant simply cannot demonstrate he was denied due process by the trial court's failure to inform him of a possible enhanced sentence in the event the prosecution filed a notice of intent to seek an enhanced sentence.[35]

Besides the fact that habitual offender proceedings are treated differently than proceedings for the substantive offense, another reason exists which provides support for the argument that what occurred in the instant case did not raise valid constitutional concerns. In *People v Dunn,* 380 Mich 693, 699-700; 158 NW2d 404 (1968), this Court specifically held that there is no constitutional requirement that a defendant be told the maximum sentence during a plea proceeding on the ***charged offense***. This Court held that neither the constitution of the

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US at 490, citing *Jones v United States,* 526 US 227, 252-253; 119 S Ct 1215; 143 L Ed 2d 311 (1999), emphasis added].

[35] In *McCarthy v United States,* 394 US 459, 465; 89 S Ct 1166; 22 L Ed 2d 418 (1969), the Court noted that the procedures set forth in Fed R Crim P 11 were not constitutionally mandated, but were designed to assist the trial judge "in making the constitutionally required determination that a defendant's guilty plea is truly voluntary." In *Kelleher v Henderson,* 531 F2d 78, 81 (CA 2, 1976), the court recognized that after the decision of the United States Supreme Court in *McCarthy, supra,* noncompliance with Fed R Crim P 11 requires automatic reversal, but not because failure to comply violates constitutional law.

The federal rules of criminal procedure were promulgated by the United States Supreme Court pursuant to statutory authority under the Rules Enabling Act, 28 USC § 2072 & 2074, and passed by the United States Congress. See *State v Adkins,* 176 W Va 613, 627; 346 SE2d 762 (1986). The advisory committee notes are published along with the final adopted rules, and, "although not binding, the interpretations in the Advisory Committee Notes are nearly universally accorded great weight in interpreting federal rules." *US v Marion,* 562 F3d 1330, 1338 (CA 11, 2009), citing *United States v Elmes,* 532 F3d 1138, 1144 (CA 11, 2008), n 7. The 1974 advisory committee notes recognize that judges are not required to advise of possible recidivist enhancement. See *Recht, supra* at 510-511 & footnote 26, *supra.* If the United States

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United States nor the Michigan Constitution required the trial court to inform a defendant of the maximum sentence. In *Dunn, supra*, this Court indicated that to require a defendant to be informed of the maximum penalty "misconstrue[s] the purpose of the examination of the accused by the trial court." *Id.* at 700. This Court indicated:

> The effect of so holding is to make the test of valid plea of guilty, not whether it is freely, understandingly, and voluntarily made, but whether the punishment prescribed accords with the accused's notion of what he is willing to subject himself to by his plea of guilty. The purpose of the court's examination as prescribed by the rule is not to determine what the accused can expect the judge may do by way of disposition. The purpose is to find out if the accused is pleading guilty because he in fact is guilty, and that his plea of guilty is freely made. ....This State has traditionally separated the question of guilt or innocence from the question of punishment. Even in the *trial,* of a criminal case it is improper, unless provoked, to argue to a jury what the accused's sentence could be. [*Id.*]

After the decision in *Boykin, supra,* the ruling in *Dunn, supra,* was followed by an equally divided court in *People v Ferguson,* 383 Mich 645, 656; 178 NW2d 490 (1970)(trial court is not obliged to tell an accused, who is represented by counsel, the maximum penalty for the offense charged).[36] The decision in *Ferguson, supra,* did not violate the dictate of *Boykin, supra,* because the United States Supreme Court has never held that a plea violates due process if a defendant is not informed of the maximum sentence for the charged offense during the plea proceeding. Instead, the *Boykin* Court recognized that to help ensure that the plea was voluntary, trial courts are "best advised" to inform defendants of the permissible range of sentence. 395 US at 244, n 7.

Supreme Court disagreed with the advisory committee notes, presumably the rules could have been amended or the advisory committee notes eliminated.

[36] See also *State v Johnson,* 40 Ohio St 3d 130, 133; 532 NE2d 1295 (1989)(knowledge of the maximum and minimum sentences during a plea proceeding is not constitutionally required).

Even commentators that have recommended that trial courts inform defendants of potential habitual offender implications have recognized that if a judge fails to advise a defendant of ***direct*** consequences of a plea, it does not follow that the failure amounts to a violation of due process. See LaFave, supra. Instead, the commentators suggest that the question comes down to whether having the accurate information would have made any difference in the defendant's decision to enter the plea.[37] Accord *Williams v Smith,* 591 F2d 169, 172 (CA 2, 1970)(test for determining the constitutional validity of a state court guilty plea where the defendant has been given sentencing misinformation is whether the defendant was aware of the actual sentencing possibility, and, if not, whether accurate information would have made any difference in his decision to enter a plea).[38]

Defendant is not entitled to withdraw his plea because the plain language of MCR 6.302 only requires the trial court to inform a defendant of the maximum penalty for the charged offense and the habitual offender statute does not create a substantive offense separate and independent of the principal charge. *Boatman,* 273 Mich App at 407. Moreover, there is no constitutional requirement that a defendant be informed during his plea proceeding that his sentence may be enhanced based on his status as an habitual offender. Finally, MCL 769.13(3) allows the prosecution to file a notice of intent to seek an enhanced sentence following a guilty plea at the arraignment. Therefore, this Court cannot find that the trial court's decision to deny

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[37] The commentators did note that if a defendant received a sentence longer than he knew could be imposed, then the trial judge's failure to so inform the defendant would amount to a due process violation. LaFave, supra.

[38] The court also recognized that because the defendant and his attorney did not raise any form of objection once they were apprised of the possible application of the persistent offender statute, their silence suggested that accurate information would not have affected their initial plea decision. *Id.* at 173.

defendant's motion to withdraw his guilty plea was outside the range of reasonable and principled outcomes. *Babcock, supra.*

E. Even if this Court believes that the better course of action would be to advise defendants about the possibility that their maximum sentence may be enhanced based on their status as an habitual offender, the appropriate remedy would not be the withdrawal of defendant's guilty plea, but to amend MCR 6.302(B).

In *Boatman,* 273 Mich App at 410, the Court expressed concerns about the retrospective effect of a decision requiring a defendant to be informed about the maximum penalty as an habitual offender due to the "potential to promote and incur an influx of appeals on this issue." The concerns raised in *Boatman* are justified because the majority of criminal convictions result from pleas, and when new grounds for setting aside guilty pleas are approved, the impacts are vast. *United States v Timmreck,* 441 US 780, 784; 99 S Ct 2085; 60 L Ed 2d 634 (1979).[39] Moreover, defendants rarely raise, in a motion to set aside a guilty plea, that unfair procedures resulted in the conviction of an innocent man. *Id.*

Even if this Court believes that the better approach would be to require trial courts to inform defendants that their maximum sentence may be increased based on their habitual offender status, the appropriate remedy should be an amendment of MCR 6.302 because, "[I]t may be more feasible to set up guidelines by adopting a new rule than through the decisional

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[39] The Court further noted, "Every inroad on the concept of finality undermines confidence in the integrity of our procedures; and, by increasing the volume of judicial work, inevitably delays and impairs the orderly administration of justice." *Id.* In the case *sub judice*, defendant waited almost six months to file his motion to withdraw his plea, claiming he was not told the maximum sentence that could be imposed based on the filing of the notice of intent to seek an enhanced sentence. Defendant presumably knew a few days after his plea that the prosecution had filed the notice and clearly knew at the time of sentencing that he was being sentenced as an habitual offender. Nonetheless, neither defendant nor his attorney said anything prior to the sentence being imposed which suggest that "*accurate information*" would not have affected his initial plea decision. *Williams,* 591 F2d at 173.

process." *People v Williams,* 386 Mich 277, 291; 192 NW2d 466 (1971). Although most states do not have specific court rules requiring defendants to be informed of the possibility of an enhanced sentence,[40] at least eight states do have such rules. For example, in Illinois, the trial court must inform a defendant of the "minimum and maximum sentence prescribed by law, including, when applicable, the penalty to which the defendant may be subjected because of prior convictions or consecutive sentences." 177 Ill 2d R 402(a)(2). In Alabama, the trial court shall not accept a guilty plea without first informing the defendant of the "maximum possible penalty provided by law, including any enhanced sentencing provisions." Ala R Crim P 14.4.[41]

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[40] Many states have guilty plea court rules patterned after Rule 11 of the Federal Rule of Criminal Procedure [Fed R Crim P 11], and Rule 11 does not require a sentencing court to advise a defendant that he may be subject to additional punishment by reason of the defendant's previous conviction. See footnote 26, *supra.* Rule 11 requires the sentencing court to "inform the defendant of, and determine that the defendant understands":

> (H) any maximum penalty, including imprisonment, fine, and term of supervised release;
> (I) any mandatory minimum penalty;
> (J) any applicable forfeiture;
> (K) the court's authority to order restitution;
> (L) the court's obligation to impose a special assessment;
> (M) in determining a sentence, the court's obligation to calculate the applicable sentencing guideline range and to consider the range, possible departures under the Sentencing Guidelines, and other sentencing factors under 18 USC §3553(a); and
> (N) the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence. [Fed R Crim P 11].

A few of the states with guilty plea rules modeled after Fed R Crim P 11 include North Dakota, ND R Crim P 11, Tennessee, Tenn R Crim P 11, and West Virginia, WV R Crim P 11.

[41] See also Ark R Crim P 24.4(d)(defendant must be informed that "if the offense charged is one for which a different or additional punishment is authorized because the defendant has previously been convicted of an offense...the previous conviction may be established after the entry of his plea... thereby subjecting him to different or additional punishment); Practice Book 39-19(4)(Connecticut)(defendant must understand the "maximum possible sentence on the charge, including... when applicable, the fact that a different or additional punishment may be authorized by reason of a previous conviction"); Ga Uniform Superior Court Rule 33.8(a

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MCR 6.302(B)(2) could be amended to reflect the fact that trial courts must advise defendants and determine that they understand:

> (2) the maximum possible prison sentence for the offense, any mandatory minimum sentence required by law, ***and the fact that additional punishment may be authorized by reason of a previous conviction***.[42]

There are no constitutional provisions, statutes or court rules requiring defendants to be informed during a plea proceeding on the substantive offense that their maximum penalty may be increased if an habitual offender notice is filed. Nonetheless, if this Court concludes that the better course of action[43] is for trial courts to provide information during plea proceedings that maximum sentences may be enhanced if a notice to seek sentencing enhancement is filed, then amending MCR 6.302 would ensure that trial judges provide this information.[44]

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defendant must be informed "of the maximum possible sentence on the charge, including that possible from consecutive sentences and enhanced sentences where provided by law"); Md Rule 4-245(the trial judge must inform a defendant, "where appropriate, of the maximum possible sentence on the charge, and where appropriate....of any different or additional punishment upon subsequent offense); Mass R Crim P 12(judge shall inform the defendant "where appropriate, of the maximum possible sentence on the charge...; of any different or additional punishment based upon subsequent offense"); Minn R Crim P 15.01(judge must ensure that the defendant understands "the maximum penalty the judge could impose for the crime charged (taking into consideration any prior convictions").

[42] Although a more specific court rule could be proposed, as one former Supreme Court Justice has recognized, "[I]t ought to be abundantly clear that the more i-dotting and t-crossing is required of trial judges by appellate judges, the more fodder there will be for post-conviction applications." *People v Jaworski,* 387 Mich 21, 40; 194 NW2d 868 (1972)(Brennan, J., dissenting).

[43] See *Elliott, supra* at 512; LaFave, *supra.*

[44] See *Padilla, supra* (Alito, J., concurring)("a nonconstitutional rule requiring trial judges to inform defendants on the record of the risk of adverse immigration consequences can ensure that a defendant receives needed information without putting a large number of criminal convictions at risk").

F. Conclusion

Defendant's case is not the appropriate case to grant leave to appeal on the question this Court asked the parties to address, because defendant's appeal will become moot in a matter of months [September 2010] when he is discharged from parole. However, even if this Court believes this case is the appropriate case to decide the question, defendant is not entitled to withdraw his plea. Defendant cannot withdraw his plea because the People had statutory authority to file the notice of intent to seek an enhanced sentence after his guilty plea. MCL 769.13(3). Moreover, there are no statutes, court rules or constitutional provisions requiring a defendant to have notice during a plea proceeding that his maximum sentence may be enhanced if the prosecutor files a notice of intent to seek an enhanced sentence. This Court should deny defendant's application for leave to appeal, but could also, if it deems it to be the better course of action, amend MCR 6.302 in order to reduce post-conviction claims of error.

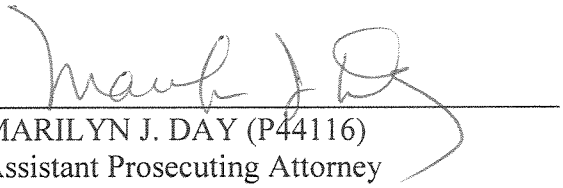
RELIEF

WHEREFORE, Jessica R. Cooper, Prosecuting Attorney in and for the County of Oakland, by Marilyn J. Day, Assistant Prosecuting Attorney, respectfully requests that this Honorable Court deny defendant's application for leave to appeal.

Respectfully Submitted,

JESSICA R. COOPER
PROSECUTING ATTORNEY
OAKLAND COUNTY

JOHN S. PALLAS
CHIEF, APPELLATE DIVISION

By: 

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DATED: April 2, 2010